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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
STATE OF MINNESOTA, Acting by and Through the MINNESOTA DEPARTMENT OF TRANSPORTATION and the MINNESOTA DEPARTMENT OF ADMINISTRATION Petition for declaratory Ruling Regarding the Effect of Sections 253(a) and (c) of the Telecommunications Act of 1996 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of -Way	)	CC Docket No. 98-1

REPLY COMMENTS OF ICS/UNC, L.L.C.

ICS/UNC, L.L.C. ("ICS") hereby submits these Reply Comments in response to the Federal Communications Commission's Public Notice ("Notice"), DA 98-32, released January 9, 1998, requesting comment in the above captioned docket in connection with the Petition for Declaratory Ruling filed by the State of Minnesota, by and though the Department of Transportation and Department of Administration (collectively "Minnesota").

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List A B C D E

I. INTRODUCTION

ICS is a Colorado limited liability company. ICS, along with Stone and Weber Engineering Corp. ("Stone and Weber") (collectively "the Companies"), were the successful bidders in the competitive procurement process conducted by the State of Minnesota to provide fiber optic transport capacity within the state. Pursuant to the agreement between the State of

Minnesota and the Companies ("Agreement"), the Companies will lay approximately 900 miles of both lit and dark fiber along interstate highways in Minnesota and 1,000 miles of both dark and lit fiber along rural routes in Minnesota.

In the Petition, Minnesota seeks a ruling from the Commission declaring that the Agreement comports with §253(a), (b) and (c) of the 1996 Telecommunications Act ("Act").[1] Because the Agreement provides for the creation of infrastructure rather than telecommunications services, ICS agrees with Minnesota that § 253 is inapplicable to the Agreement. Alternatively, if the requirements of § 253 are found to apply, ICS agrees with Minnesota that because the Agreement does not create any barriers to entry and because the Agreement was created and will be administered through competitively neutral and non-discriminatory methods, the Agreement comports with the requirements set forth in § 253 and the policies which underlie § 253.

II. DISCUSSION

A. Section 253 is Inapplicable to the Agreement

Minnesota correctly submits that § 253 does not even apply to the Agreement. Section 253(a) provides that "[n]o State or local statute or regulation or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." Telecommunications service has been defined under the Act as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public."[2]

[1] 47 U.S.C. §253(a), (b) and (c).

[2] 47 U.S.C. §153(45).

The Agreement simply does not relate to the provision of telecommunications services, but instead to the development of infrastructure. Unlike other cases which have found § 253 to be applicable, the Agreement imposes no requirements upon any entity with regard to the provision of telecommunications services.[3] In fact, the Agreement instead provides additional competitive opportunities and infrastructure other entities may utilize to provide telecommunications services, not previously available. Moreover, the fact that ICS is a carrier's carrier which is contractually prohibited from providing telecommunications services to end users further supports the position that § 253 is inapplicable.

U.S. West Communications, Inc. ("U.S. West") argues that because the Agreement effects the ability of telecommunications providers to install or access facilities, the Agreement, therefore, prohibits such entities from providing telecommunications services. This interpretation greatly exceeds the intended scope of § 253. Under U.S. West's interpretation, any construction which does not provide for participation by all potential telecommunications providers would be subject to § 253. For example, under U.S. West's interpretation of § 253, a state's decision to construct a new road or transit system without providing access to all current and potential telecommunications service providers, would have to comport with § 253. This interpretation extends the reach of § 253 far beyond its intended effect. Instead, because § 253 is limited to state and local efforts to prohibit provision of telecommunications services rather that contractual arrangements regarding telecommunications infrastructure, § 253 is inapplicable to the Agreement.

B. The Agreement Does Not Violate Section 253(a)

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[3] *See, e.g., California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, FCC 97-251 (rel. July 17, 1997) ("*Huntington Park Order*") (holding that state and local regulations regarding the payphone market are subject to § 253 scrutiny); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639 (Sept. 24, 1997) ("*Silver Star Order*") (analyzing Wyoming's rural incumbent protection provisions under the § 253 rhetoric).

Assuming that § 253 does affect the provisions of telecommunications services and is, therefore, applicable to the Agreement, no violation of § 253(a) exists. The Commission has stated that contracting conduct implicates § 253(a) only if it materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair an balanced legal regulatory environment in the market for the particular type of telecommunications services. In other words, the contracting conduct would have to actually prohibit or effectively prohibit the ability to provide the service.[4]

The Agreement imposes no requirements which would prohibit or effectively prohibit the ability of any entity to provide telecommunications service in Minnesota or using the infrastructure. Rather, the Agreement provides competitive opportunities to telecommunications providers not currently existing. Thus, the Agreement specifies that the ICS must collocate the fiber of other entities concurrently with the installation of the infrastructure. Further, the Agreement also specifies that entities can purchase or lease ICS's fiber network capacity on a non-discriminatory basis. These requirements present an opportunity for other entities to defray construction costs associated with the installation of their own fiber and an opportunity for smaller providers to purchase fiber capacity without incurring the associated facilities build out costs. Further, the Agreement has no effect on the ability of other entities to operate and expand existing fiber capacity and to place new fiber in alternative locations. Hence, the assertion that the Agreement prohibits an entity from providing telecommunications service is without merit and must be rejected.

Although the Agreement gives the Companies temporary exclusive access to a public right-of-way, those submitting comments in opposition to the Petition have been unable to

[4] *Huntington Park Order.* At ¶ 38.

support the position that such action constitutes a barrier to entry under § 253(a). For example, in support of its position, U.S. West cites several Commission decisions which are inapplicable to the Agreement. Thus, U.S. West cites to Commission decisions holding that § 253(a) "at the very least, proscribes state and local legal requirements that prohibit **all but one entity** from providing telecommunications services in a particular state or locality"[5] and that "any grant of **exclusive market entry rights** ... would raise serious questions under § 253(a)."[6] The Commission has also held that "new entrants should be able to chose whether to resell services, obtain unbundled network elements, utilize their own facilities, or employ any combination of these three options."[7] The facts of these Commission decisions are in stark contrast to the Agreement which does not prohibit the offering of telecommunications services. The Agreement neither grants exclusive market entry rights nor prohibits all but one entity from providing telecommunications services. Rather, the Agreement allows both new and existing entrants a unique opportunity to collocate their facilities or to purchase or lease network capacity, or any combination thereof in a non-discriminatory manner.

C. Sections 253(b) and (c) Provide a Safe Harbor Rather than a Separate Basis for Preemption

Several of the comments submitted in opposition to the Petition include arguments urging the Commission adopt the position that § 253(b) and (c) provide separate basis for preemption. However, the Commission has concluded that § 253(b) and (c) do not provide a separate basis

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[5] *Classic Telephone, Inc*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13085 (1996) ("*Classic Telephone*")

[6] *Public Utility Comm'n of Texas, et al.*, Memorandum Opinion and Order, FCC 97-346 (rel. Oct 1, 1997) ("*Texas PUC*") at ¶ 89.

[7] *Texas PUC* at ¶ 74.

for preemption.[8] Moreover, the language in § 253(b) stating that "[nothing] in this section effects the authority of a state to ..." clearly refute any assertion that provide separate bases for preemption. Hence, this argument is completely without merit.

D. The Agreement is Permissible Under Section 253(b) and (c)

1. Section 253(b)

Section 253(b) is a safe harbor provision which recognizes and preserves the right of states to impose requirements which protect the public safety. Specifically, § 253(b) provides, "[n]othing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Hence, to satisfy the requirements of § 253(b), a State's requirement must: (1) be necessary to fulfil the enumerated public interest requirements of § 253(b); and (2) be competitively neutral. In the context of § 253(b), the term necessary means more than "useful" and requires a detailed analysis of means and ends.[9] In contrast, the analysis of competitive neutrality requires only a faccial review of the

[8] *See, e.g., Texas PUC* at ¶ 44 (Section 253(b) carves out defined areas where states may continue to regulate); *Huntington Park Order* at ¶ 25 (Because § 253(b) not violated, not necessary to reach the question of whether § 253(b) applies); *Silver Star Telephone Company, Inc, Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639 at ¶ 37 (1997) (*"Silver Star Order"*) (describing analysis of § 253 preemption); see also, *GST Tucson Lightwave v. City of Tucson*, 950 F.Supp. 968 (D.Ariz. 1996) (describing legislative history supporting the position that no private right of action exists under § 253(c)).

[9] *Silver Star Order* at ¶ 45.

challenged requirement.[10] The competitive neutrality requirement does not mean "equal treatment."[11]

Minnesota's Petition is replete with evidence that restricted access to freeway rights of way are necessary to protect the public safety. In fact, until 1989, Federal policies prohibited longitudinal access along freeways for installations of utility facilities, as a result of safety and traffic concerns.[12] The determination that exclusive access to freeway right of ways is necessary for the safety of the traveling public and transportation workers is, therefore, both within the traditional exercise of a state's police power and sufficient to meet the necessity requirement of § 253(b).[13]

Moreover, Minnesota has satisfied the competitive neutrality requirement by engaging in a competitive bidding process and by requiring non-discriminatory collocation of fiber as well as the sale and leasing of network capacity. Those opposing the Petition argue that the Agreement is not competitively neutral because all carriers must choose to install fiber at the time of ICS's installation, or never, and because maintenance of the right-of-ways lies exclusively with ICS. The commentators appear, therefore, to argue that to be competitively neutral, any telecommunications infrastructure arrangement must allow and provide for the ability of all present and future telecommunications service providers to install and maintain their own

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[10] Id.

[11] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems,* CS Docket 96-46, Second Report and Order, (*"Open Video Systems"*), FCC 96249 (rel. June 3, 1996) at ¶ 195.

[12] Minnesota Petition at p. 6.

[13] *See also U.S. West Communications, Inc. v. City of Longmont, 948 P.2d 509 (Colo. 1997)(local, State and governments may compel a utility to relocate its facilities from the public right of way as a reasonable exercise of police power to regulate the health, safety or welfare of its own citizens.)*

networks, at the time of their choosing. Such an expansive definition of competitive neutrality would swallow the safe harbor provision intended by § 253(b) and is, therefore, without merit. Commentators further argue that the Agreement is not competitively neutral because it provides no enforcement mechanism to assure that ICS's rates are non-discriminatory. The possibility, however, that the Companies may breach the Agreement or that Minnesota may enforce the Agreement in a discriminatory manner provides no basis for declaring the Agreement to be inconsistent with § 253. The opposition comments suggesting that no enforcement mechanisms exist to ensure compliance by ICS with the non-discriminatory pricing requirements set forth in the Agreement also miss the mark. In addition to the remedies available to Minnesota in the case of a default by ICS under article XVI of the Agreement, ample means exist through which third parties may enforce the non-discriminatory aspects of the Agreement. Such means include, but are not limited to federal antitrust and state anti-competitive legislation.[14] Finally, discriminatory conduct by either Minnesota or ICS in administering the Agreement which rises to the level of a requirement that prohibits or has the effect of prohibiting the ability of a third party to provide telecommunications services, would, at that time, be actionable under § 253.

2. Section 253(c)

The Agreement also comports with the requirements of § 253(c). Section 253(c) provides that "[n]othing in this section affects the authortiy of a state of local government to manage the public rights-of way or to require fair and reasonable compensation from telecommunications providers on a competitively neutral and non-discriminatory basis, for use of the public rights-of-way, on a non-discriminatory basis, if the compensations required is publicly disclosed by such government.

[14] *See 15 U.S.C. §§1-7*; Minn. Stat. §§ 325D.49-325D.66.

In a reasonable exercise of its power to manage the public rights-of-way, Minnesota has determined that those rights of way have limited capacity for entry by telecommunications providers. Nearly every governmental body responding to the Petition supported the argument that the safety of the motoring public requires strict limitations on the placement of telecommunications facilities on limited access highway facilities which limitations are in the public interest and comments on the Minnesota Petition present no argument to the contrary.

Further, because: (1) the procurement process was competitively neutral; and (2) the Agreement assures that the rates charged by ICS in connection with installation and maintenance of non-ICS fiber as well as the purchase or lease of ICS network capacity will be non-discriminatory, the Agreement meets the requirements of § 253(c).

As with the opposition arguments with respect to § 253(b), several commentators indicated that competitive neutrality and non-discrimination require that Minnesota allow all telecommunications service providers be allowed to install or maintain telecommunications facilities whenever and however they chose. This interpretation also defeats the purpose of the § 253(c) safe harbor provision which allows the states to manage rights-of-way without thwarting the pro-competitive purpose of the Act.

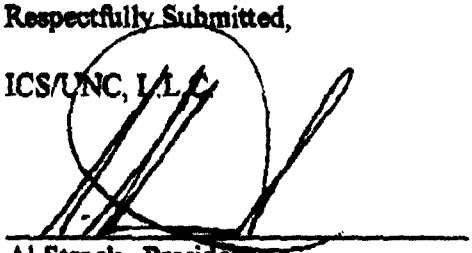
III. CONCLUSION

The Agreement between Minnesota and the Companies comports with both the requirements of § 253 and the intent of the 1996 Telecommunications Act. Accordingly, ICS urges the Commission to expeditiously issue a ruling declaring that the Agreement is consistent with the requirements of § § 253(a), (b) and (c) of the 1996 Telecommunications Act.

Dated this 9th day of April, 1998.

Respectfully Submitted,

ICS/UNC, L.L.C.

By: 

Al Strock, President